Supreme Court, U.S.
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In The
Supreme Court of the United States

LOUIS PSIHOYOS, RICK RICKMAN,
DAVID ROBERT AUSTEN,
AND MATRIX INTERNATIONAL, INC.
(as agent for Rick Rickman and Rodger Hutchings),

Petitioners,

v.

MINDSCAPE INC., NATIONAL GEOGRAPHIC ENTERPRISES INC., DATAWARE TECHNOLOGIES INC., NATIONAL GEOGRAPHIC SOCIETY, NATIONAL GEOGRAPHIC INTERACTIVE, EASTMAN KODAK CO. AND NATIONAL GEOGRAPHIC HOLDINGS, INC., doing business as NATIONAL GEOGRAPHIC INTERACTIVE, doing business as NATIONAL GEOGRAPHIC ENTERPRISES INC.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

I. Whether the Plain Language and Statutory History of § 201(c) of The Copyright Act of 1976, 17 U.S.C. § 201(c), Indicate That a CD ROM/DVD Collection Entitled *The Complete National Geographic, 108 Years of National Geographic ("CNG")* – Containing 108 Years of Prior Versions of Various Magazines (With No Updated or New Information Like a Revised Encyclopedia or Periodical) in Addition to a Computer Program, a Search Engine, a Video Montage, Graphics, Advertisements, a "Clip Art" Feature for Cutting and Pasting Articles/Photos, Website Links, etc. – that Targeted a New Market of Consumers and Created Substantial New Revenues for Respondents is a New Anthology or New Collective Work Rather than a Privileged "Revision"?

Compare: *Greenberg v. National Geographic*, 244 F.3d 1267 (11th Cir.), *cert. denied*, 122 S. Ct. 347 (2001) (answering "yes"), *with*

Faulkner v. National Geographic Enterprises Inc., 409 F.3d 26 (2d Cir. 2005) (answering "no"), *petition for reh'g denied*

RULE 29.6 DISCLOSURE STATEMENT

Petitioners Louis Psihoyos, Rick Rickman, David Robert Austen, and Rodger Hutchings are private citizens and plaintiffs/appellants below.

Petitioner Matrix International, Inc. is a privately held corporation with no public outstanding stock and a plaintiff/appellant below. Accordingly, no publicly held corporation holds or owns 10% or more of Matrix's stock.

Respondents National Geographic Society, National Geographic Enterprises, Inc., and Mindscape, Inc., were defendants/appellees below.

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STATUTES

17 U.S.C. § 201(c) ..... *passim*

28 U.S.C. § 1254(1) 1

OTHER AUTHORITIES

H.R. Rep. No. 94-1476 (Sept. 3, 1976), at pp. 122-123, *reprinted in* 1976 U.S.C.A.A.N. 5659, 5738 16

Rule 10, Rules of the Supreme Court of the United States 13, 20

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February 14, 2001, Statement of MaryBeth Peters, Register of Copyrights to Congressmen McGovern, commenting on *Tasini*, published in 147 Cong. Rec. E182-02, 2001 WL 124374 (Cong. Rec.) 16, 17

PETITION FOR WRIT OF CERTIORARI

Petitioners hereby pray that this Court grant a writ of certiorari to review the Second Circuit's partial affirmance of the judgment of the district court.

OPINIONS BELOW

The opinion of the Second Circuit (App., *infra*, 1) is reported as *Faulkner v. National Geographic Enterprises Inc.*, 409 F.3d 26 (2d Cir. 2005). The opinion of the district court (App., *infra*, 32), is reported as *Faulkner v. National Geographic Society*, 294 F. Supp.2d 523 (S.D.N.Y. 2003).

JURISDICTION

The court of appeals' judgment was entered on March 4, 2005. On July 21, 2005, a petition for rehearing en banc was denied. This petition for writ of certiorari follows pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 201(c) of the Copyright Act of 1976 provides:

> Copyright in each separate contribution to a collective work is distinct from copyright in the collective work as a whole, and vests initially in the author of the contribution. In the absence of an express transfer of the copyright or of any rights under it, the owner of copyright in the collective work is presumed to have acquired only the privilege of reproducing and distributing the

> contribution as part of that particular collective work, any revision of that collective work, and any later collective work in the same series.

17 U.S.C. § 201(c).

STATEMENT OF THE CASE

I. Summary

This case raises a very important legal issue in an emerging area of copyright law involving the interpretation of § 201(c) of the Copyright Act of 1976, 17 U.S.C. § 201(c) – an Act meant to protect authors and photographers from publishers using their works without just compensation.

Specifically, a discord has occurred between the Second and Eleventh Circuits as to whether the CNG – a new CD-ROM/DVD compendium of past magazine issues with no revised or updated information, but added technological features such as a video montage, a computer program, a search engine, advertisements, graphics, a website link, a "Clip Art" feature encouraging users to cut-and-paste photos and "incorporate any Image(s) into [users'] own original work and publish, display and distribute [users'] work in any media,"[1] is a privileged "revision" or a new collective work, a new anthology. On the same facts, what is a copyright infringement in the Eleventh Circuit is a privileged "revision" in the Second

[1] This feature creates tremendous databases with copyrights NGS did not own, having the effect of diluting residual profits of photographs, i.e., diminishing secondary market returns on the photos.

Circuit. Of note, the CNG was not a set of microforms or other celluloid reproduction of the magazines. Binary codes, computer programming and electronic commerce are involved here creating the ability to alter and distort original works.

Additionally, the Second Circuit misinterpreted *New York Times Co. v. Tasini*, 533 U.S. 483, 121 S. Ct. 2381 (2001), in determining whether the CNG was a "revision" under the Act. The court erroneously found *Tasini* to be an intervening change in law.

This is an emerging area of copyright law in need of direction from this Court, and a ruling would provide much needed guidance to authors, photographers and publishers across the country. Uncertainty is created, and the issue is a recurring one in light of the technology used. As explained by National Geographic's counsel, Terry Adamson:

> "you have totally divergent views of the same statutory provision" in different courts. "We want the Supreme Court to hear it." Until the law gets settled, he adds, CNG will not go back on sale.[2]

The ramifications of the Second Circuit's holding has a chilling effect on the ability of photographers and authors to make a living. This ruling will destroy secondary markets. Photographs and works are distributed in an electronic market capable of manipulation. As noted by the American Society of Media Photographers, "[o]nce the valuable works of freelance authors enter the world of

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[2] *See Internet*, http://www.boston.com/ae/media/articles/2005/10/04/its_a_case_of_who_ owns_the_words/. If *Tasini* was truly an intervening change in law, then Respondents would continue to sell the CNG.

electronic commerce without their consent and without any payment to them, the licensing value of those works is irretrievably lost."[3]

II. The CNG at Issue.

Respondents, National Geographic Society ("NGS"), National Geographic Interactive ("NGI"), National Geographic Enterprises, Inc. ("NGE"), and Mindscape, Inc. (collectively referred to as "Respondents") defended against Petitioners' copyright infringement claims by invoking the privileges in the second sentence of § 201(c). Respondents claimed that the CNG was a permissible "revision" under that statute.[4]

Since 1997, Defendants published numerous editions and configurations of the CNG, on both CD-ROM and DVD, all of which have been mass-marketed and sold to a new market of consumers through new retail outlets and Internet websites, including amazon.com, cheapSoftware.com, eBay.com, Kodak.com, nationalgeographic.com, and angelicum.net (Academy Bookstore). This product brought to the newly marketed consumer's home computer, for the first time, a mass marketed interactive application permitting consumers to view and navigate, using sophisticated search engine features, the complete

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[3] *See Internet*, http://www.asmp.org/commerce/legal_article_012.php.

[4] NGS claimed that it may share its privileges with second-tier subsidiary, NGI. NGS further claimed that it had a right to transfer its privileges to Mindscape.

collected issues of the Magazine, dating back to its first issue in 1888.[5]

Using the CNG, consumers can also easily, and in fact are encouraged to, select images from the Magazine, and cut and paste those images into other documents and publications, including digital publications such as websites. Since its commercial release, marketing and sale of the first CNG CD-ROM, NGS encouraged the user to "Print any article, page, or page spread in vivid color or black and white – perfect for reports, background

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[5] Each version of the CNG includes scanned images from the pages of a printed version of Magazine (the "Replica"), and a computer program that provides an interactive environment in which consumers can navigate, search, and view the images from the Magazine (the "Program"). The Program's universal file codes provide an easy means by which an end user can open, edit, and copy particular pages electronically for manipulation. Each time the CNG program starts in a computer, it plays an animated video of a globe and several images reflecting various covers of the Magazine (the "Sequence"). In summary form, the CNG's Sequence, Replica and Program include:

- An animated globe with music;
- A National Geographic Interactive visual montage with sound;
- A Kodak advertisement with audio voice and music;
- An electronically morphed sequence of magazine covers with music;
- Word search capability;
- Advanced search capability using Boolean operators, wildcards, and truncated words;
- A feature for saving search results;
- Article-by-article inspection;
- An interactive link with the NGS website;
- A bookmark feature;
- A button for printing any page displayed on the screen.

information and more!"[6] The CNG encourages copyright infringement not only by creating the technological ability to print, copy, and cut-and-paste photos and works, but by actively encouraging the user to do so.

It cannot be disputed that the CNG adds no updated information to each Magazine; the CNG is not an updated "version" of the Magazine, like a revised or updated dictionary, periodical, or encyclopedia. The CNG is not a copy of each original Magazine. It is not a celluloid reproduction, but rather includes computer diagrams and binary coding. Also, the CNG clearly and materially differs from the Magazine as printed and as viewed through the computer medium. In addition to the search capability via a computerized search engine, the CNG includes numerous other features that make it qualitatively different from viewing the images in the Magazine.

In the record below, the NGS director of photography concluded in a memo that the CNG was a "considerably different product" mass marketed to "thousands of outlets."[7] Referring to the CNG, Maura Mulvihill of NGS admitted in a January 17, 1997, memorandum that she routinely refuses publishers the right to copy pages containing NGS images and "charge[s] for use of the images on CD even if it is the same title and product as the print version."[8]

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[6] Second Circuit Appx. 1121-1125.

[7] Email from Kent Kobersteen to editor Bill Allen dated March 20, 1997, Appx. 1209-1210.

[8] Memorandum from Maura Mulvihill of NGS to Suzanne Dupre, Esq., vice president and corporate counsel of NGS, dated January 17, 1997 (emphasis added), Appx. 0552. *See also* Memorandum from Carolyn F. Clewell of NGS dated January 18, 1997, Appx. 0553 ("Just

(Continued on following page)